

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

INTERNATIONAL ASSOCIATION OF FIRE))	
FIGHTERS, LOCAL 3228,)	
)	
Petitioner,)	
)	
v.)	Public Case No. R 89-023
)	
CITY OF GLADSTONE,)	
)	
Respondent.)	

JURISDICTIONAL STATEMENT

This case appears before the State Board of Mediation upon the filing by International Association of Fire Fighters, Local 3228, of a petition for certification as public employee representative of all non-supervisory public safety officers of the Respondent including the job classification of dispatcher. Hearing was held on September 5, 1989, in Kansas City, Missouri, at which representatives of Local 3228 and the City were present. The case was heard by State Board of Mediation Chairman Mary Gant, employer member Milton Talent, and employee member David Langston. The State Board of Mediation is authorized to hear and decide issues concerning appropriate bargaining units by virtue of Section 105.525, RSMo. 1978.

At the hearing, the parties were given full opportunity to present evidence. The Board after a careful review of the evidence, sets forth the following findings of fact and conclusions of law.

FINDINGS OF FACT

The City of Gladstone (hereinafter referred to as the City) combined its police and fire services into a Public Safety Department in 1968. This integration was accomplished by cross-training the existing police officers and fire fighters. The Department now consists of three separate bureaus: Law Enforcement, Fire/Emergency Medical Services (hereinafter referred to as EMS) and Support Services. These

bureaus are divided along departmental lines and each is supervised by a captain; the captains report to the Director of the Department. Below the captains in the organizational chain of command are the sergeants; three work in the Fire/EMS bureau and six work in the law enforcement bureau.

All three bureaus are staffed with employees known as Public Safety Officers (hereinafter referred to as PSO's). These employees are cross trained to perform police duties, fire fighting duties and emergency medical duties. The approximate 40 PSO's are assigned to the various bureaus according to departmental needs; 15 work in the Fire/EMS bureau (seven in Fire and eight in EMS), 24 work in the law enforcement bureau and one works in the support services bureau. While all the PSO's, except one, are assigned to either the law enforcement bureau or the Fire/EMS bureau, they are interchangeable in that they can and do perform duties outside their assigned work area in the other bureau. Thus, all PSO's are capable of performing law enforcement, fire fighting or paramedic functions. Some PSO's currently assigned to the Fire/EMS bureau previously worked in the law enforcement bureau and conversely, some PSO's currently assigned to the law enforcement bureau previously worked in the Fire/EMS bureau. Historically, PSO's worked in one bureau for several years and then were transferred to the other bureau. Such transfers used to be made involuntarily, but the Department's current policy is not to involuntarily transfer employees between bureaus.

All employees hired as PSO's receive minimum training in police, fire and emergency medical services, to wit: a minimum of 120 hours of police training, 136 hours of fire training and 48 hours of emergency medical training. PSO's working in EMS receive additional training (about 1000 hours) in order to be licensed as emergency medical technicians and paramedics.

All PSO's in the Department are commissioned law enforcement officers and all but one are certified as law enforcement officers by the (MO) Highway Patrol Academy; thus, all are sworn police officers and possess the power of arrest. In addition, all

PSO's are certified by the state as Fire Fighter I's. All PSO's wear similar uniforms although employees assigned to the fire/EMS bureau have day uniforms that they wear at the station house. All PSO's wear a badge that identifies them as a City PSO and are issued handguns by the City. Each PSO is evaluated in all three areas of the PSO function (namely police, fire and EMS), even if the employee has not worked in all the areas. All PSO's are paid the same except for overtime and receive the same benefits.

Those PSO's assigned to the law enforcement bureau do traditional police work. They spend the greatest percentage of their work day patrolling the streets in marked patrol cars and the remainder of their time performing such duties as issuing traffic citations, responding to calls and making arrests. In addition to these police type duties, the PSO's assigned to the law enforcement bureau also have fire fighting responsibilities. Specifically, they carry fire gear in the vehicles while both on and off duty and are often the first to arrive at a fire scene. At the fire scene they function as traditional fire fighters in that they man the fire hoses. Thus, they work side by side with the Fire/EMS PSO's at the fire scene. However, they do not function as fire apparatus operators.

The primary job duties of the Fire PSO's are to maintain and operate the Department's fire apparatus. Similarly, the primary job duties of the EMS PSO's are to maintain and operate the Department's ambulances and other medical equipment. These employees spend virtually 100% of their time in fire suppression and emergency medical activities. When not engaging in those activities, they perform house keeping and equipment maintenance duties at the station and attend training sessions. They work at the City's two station houses and have sleeping and cooking facilities at the stations. Law enforcement PSO's do not utilize the sleeping or cooking facilities at the station houses. PSO's assigned to the Fire/EMS bureau do not routinely perform any law enforcement function because they have to stay with their fire apparatus at all times while on duty. Therefore, they do not respond to police calls, do not patrol city streets

and do not make arrests. Although there have been occasions when Fire PSO's made traffic stops, the Department's current policy is that they are not to make such traffic stops. They do handle walk-in reports and jailer duty on a voluntary basis when PSO's assigned to law enforcement are not available. On rare occasions, Fire/EMS PSO's will be summoned for a police call during working hours. When this happens, they function as police officers.

The law enforcement PSO's, fire inspector and sergeants work eight hour shifts with a 40 hour week while the Fire/EMS PSO's, except for the fire inspector, work traditional fire fighter shifts of 24 hours on duty followed by 48 hours off duty for an average 56 hour week. No law enforcement PSO's work 24 hour shifts. PSO's assigned to the Fire/EMS bureau are treated for overtime payment as fire protection employees under the Fair Labor Standards Act (FLSA), while PSO's assigned to the law enforcement bureau are compensated for overtime as law enforcement employees under that statute. PSO's can work overtime outside their normally assigned work area. For example, some PSO's working in the Fire/EMS bureau have worked overtime in the law enforcement area. Fire PSO Potter estimated this has happened to him three times in three years.

Four full time dispatchers work in the Department's support services bureau. Their main job duties are to dispatch police, fire and emergency medical service calls to the appropriate bureau. Although they wear uniforms and work with and have daily contact with the PSO's in the performance of these duties, they are not PSO's themselves. For example, they are not sworn or commissioned officers, do not engage in traditional police work such as enforcing laws or investigating crimes, do not carry weapons and do not have the power of arrest. When a dispatcher is sick, on vacation or otherwise absent, that position is filled by a PSO. Dispatchers work a 40 hour week. There have been several dispatchers who ultimately became PSO's.

CONCLUSIONS OF LAW

Local 3228 has petitioned to be certified as public employee representative of a bargaining unit comprised of all PSO's and dispatchers working in the City's Public Safety Department. In the alternative, the Union requests an election in a unit composed of Fire/EMS PSO's and dispatchers. The City's position is that all PSO's are "police" within the meaning of Section 105.510, RSMo. 1978 and therefore excluded from this Board's jurisdiction. The City further contends that the dispatchers would also be considered "police" under that same statute. Finally, the City submits that the sergeants in the Department are supervisory employees who should be excluded from any proposed bargaining unit.

The contentions posed above require that three issues be resolved:

- (1) whether the PSO's are "police" within the meaning of Section 105.510 and therefore excluded from the statute's coverage; and the Board's jurisdiction;
- (2) whether the dispatchers are "police" within the meaning of Section 105.510 and if not, whether they share a community of interest with the PSO's; and
- (3) whether the sergeants are supervisors.

The threshold issue herein is whether PSO's are "police" within the meaning of Section 105.510. The City contends that they are, while the Union disputes this contention. If the PSO's are "police", they are excluded from the statute's coverage and this Board lacks jurisdiction. However, if the PSO's are not "police", they are not excluded from the statute's coverage and the Board has jurisdiction.

In deciding this question we look to the statute itself which provides as follows:

Employees, except police, deputy sheriffs, Missouri State Highway Patrolmen, Missouri National Guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing.

This section grants certain rights to public employees and excludes certain categories of employees from the statute's coverage and the Board's jurisdiction. The exclusions pertinent herein are "police, deputy sheriffs, Missouri State Highway Patrolmen (and) Missouri National Guard." While all these categories involve law enforcement personnel, it is noteworthy that the legislature did not specifically exclude law enforcement employees, per se. It is also specifically noted that PSO's are not listed as an exclusion. In the absence of a specific exclusion, the inference is that the classification or category of employee is included. Thus, the inference we draw is that PSO's are included within the statute's coverage unless the record indicates they fall into any of the so-called law enforcement exclusions noted above. Inasmuch as the parties have limited their discussion in this regard to just the category of "police", we will do likewise.

This is not the first time the Board has been presented with the question of whether PSO's are "police". In City of DesPeres, Public Case No. 77-027, aff'd sub nom, St. Louis County Police Officers Union, Local 844 v. Gregory, 622 S.W.2d 713 (Mo.App. 1981), this Board held that the PSO's involved therein were "police" and therefore excluded from the coverage of the statute. It is expressly noted though that this outcome was based on the parties' stipulation that the PSO's, in that case, were "police officers". Here there is no such stipulation between the parties nor is there an agreement that the employees involved are "police officers". In our view, the absence of such a stipulation indicates that the DesPeres decision is not dispositive here and provides little guidance in deciding the instant matter.

In Jackson County v. Missouri State Board of Mediation, 690 S.W.2d 400 (Mo. 1985), the Missouri Supreme Court addressed the question of whether Jackson County's correction officers were "police" under Section 105.510. The court found that

the correction officers therein were not "police" because they did not perform duties comparable to those performed by police and deputy sheriffs. In so finding, the court stated:

We think this legislative purpose can best be effectuated if the exclusion provision is interpreted to encompass those persons engaged in law enforcement who, regardless of job title, perform duties and functions substantially comparable to those performed by police and deputy sheriffs. 690 S.W.2d at 402.

It is evident from the foregoing that the job title itself is not determinative. Instead, it is the duties of the employees involved, not their job title, that is controlling in determining whether said employees are excluded as "police" under Section 105.510.

In accordance with the Court's directive, attention is now turned to the question of whether the PSO's job duties and functions are "substantially comparable to those performed by police and deputy sheriffs", Jackson County at page 402. In this regard the record indicates that all PSO's in the Department are cross trained in the three areas of public safety: law enforcement, fire fighting and emergency medical treatment. They all undergo similar training. As a result of this cross training, they are all capable of performing law enforcement, fire fighter or paramedic functions. Each PSO is a commissioned officer with the power of arrest who wears a uniform and a badge. In addition, each PSO is certified as a Fire Fighter I.

The PSO's are assigned to either the law enforcement bureau or the Fire/EMS bureau (although one PSO is assigned to the support staff bureau). About two-thirds of the PSO's are assigned to the law enforcement bureau while the remainder are assigned to the Fire/EMS bureau. These assignments are changed infrequently. Historically, PSO's have been assigned to one bureau where they worked for several years and then were transferred to the other bureau, sometimes involuntarily. Now, though, the Department's current policy is not to involuntarily transfer employees

between bureaus. Under this policy, a PSO could stay in their present assignment indefinitely if they so desired.

The PSO's assigned to the law enforcement bureau perform police functions. In addition, they also perform fire and emergency medical service duties on a regular basis. The PSO's assigned to the fire/EMS bureau perform fire and emergency medical treatment functions. They perform law enforcement duties on a limited basis.

We have no difficulty deciding, based on the above record, that the PSO's assigned to the law enforcement bureau are "police" within the meaning of Section 105.510 since they perform duties substantially comparable to those performed by police and deputy sheriffs. Not only are they trained and qualified in the law enforcement area, but they also function in that area on a daily basis. Specifically, they spend their work day performing police type work such as driving patrol, enforcing laws, investigating crimes, and responding to calls. Although they also perform fire and emergency medical service duties on a regular basis, this fact does not alter the basic conclusion that they are first and foremost, police officers.

Having found that the law enforcement PSO's are "police" and therefore excluded from the certification process, this does not automatically mean that the remainder of the PSO's in the department are "police" as well. In our opinion, the PSO's who are assigned to the Fire/EMS bureau present a much closer call. As previously noted, the Fire/EMS PSO's, like the law enforcement PSO's, are commissioned law enforcement officers and can carry weapons. They are fully capable of performing police functions and sometimes do. Having said that though, they do not perform law enforcement duties substantially comparable to those performed by police and deputy sheriffs. For example, neither the fire nor EMS/PSO's respond to police calls, they do not drive patrol, they have been instructed not to make traffic stops, they do not write tickets or traffic summons and do not make arrests. In addition, they do not help with prisoners except on a voluntary basis. Instead, the Fire PSO's maintain and operate the

Department's fire apparatus while the EMS/PSO's maintain and operate the Department's ambulances. Thus Fire/EMS PSO's are first and foremost fire protection employees and emergency medical technicians and spend virtually all of their time performing these duties. Moreover, they dress like fire fighters, work traditional fire service hours and are classified for FLSA purposes as fire protection employees; not law enforcement employees. They therefore have all the attributes of fire protection employees even though they are trained and capable of being law enforcement officers. That being so, we are not convinced they perform sufficient police functions to warrant bringing them within the ban of the statute. Accordingly, we hold that the PSO's assigned to the Fire/EMS bureau are not "police" within the meaning of Section 105.510.

In so finding, we are aware that an argument can be made that all PSO's, no matter what their functions or assignment, should be included within the definition of "police". In our view though, this argument is flawed in the following respect. The overall purpose and objective of Section 105.500, et seq., was to grant certain public employees the right to join labor organizations and meet and confer with their public employers. Nowhere in the statute though, and specifically in Section 105.510, is there an exclusion for either fire protection employees or emergency medical service employees. Similarly, there is no indication that the legislature intended to deny the statute's coverage to PSO's who perform fire or emergency medical service functions. Yet that would be the end result here were we to hold that all PSO's including those performing a fire fighting or emergency medical service function, were "police". This would result in our denying the rights granted in Section 105.510 to employees not specifically excluded by that statute. Consequently, we decline to do so. In our opinion, our holding here is not only consistent with the Jackson County decision and the language of Section 105.510, but also with the underlying purpose of that legislation.

Having found that the law enforcement PSO's are "police" and that Fire/EMS PSO's are not, the question remains whether the Fire/EMS PSO's constitute an

appropriate bargaining unit. An appropriate bargaining unit is defined by Section 105.500 (1) RSMo. 1978 as:

A unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned.

Although Missouri statutory law does not provide further guidelines for determining what constitutes a "clear and identifiable community of interest", we are satisfied that in the context of this case a unit of Fire/EMS PSO's constitutes an appropriate bargaining unit.

In reaching this decision, it is noted that we have considered the City's arguments that this ruling will require the City to hire additional employees, force the City to pursue two separate departments and deprive PSO's of their outside income. In our view though, we see no basis for such dire predictions.

Attention is now turned to the second issue herein, namely whether the dispatchers are "police" within the meaning of Section 105.510. The City argues in this regard that the dispatchers, like the PSO's, are also "police" and should therefore be excluded from the statute's coverage. In the City's view, such a holding is warranted because the dispatchers are closely identified with the PSO's, wear uniforms like the PSO's and two dispatchers have become PSO's. We reject this contention for the following reasons. First, in City of St. Louis, Board of Police Commissioners, Public Case No. 84-116, aff'd sub nom Baer v. Civilian Personnel Division, St. Louis Police Officers Association, 747 S.W.2d (Mo.App. 1988), we found that civilian dispatchers of a police department were not "police" within the meaning of Section 105.510 even though they were connected with the police function. That decision addressed and resolved this very issue and no persuasive reason was offered why this holding should not be applied here. Second, aside from the above noted decision, the record herein clearly establishes that the dispatchers are civilian employees who do not perform any traditional police functions. For example, they do not investigate crimes or enforce laws,

are not sworn or commissioned law enforcement officers, do not have the power of arrest and do not carry weapons. Instead, their primary job duty is to dispatch law enforcement, fire and emergency medical calls. That being so, the dispatchers offer a support function to the PSO's but are not themselves "police" within the meaning of Section 105.510. It follows from this decision that dispatchers are not excluded from the Act's coverage.

As a practical matter, the conclusion reached above disposes of the remaining portion of this issue, namely whether the dispatchers share a community of interest with the PSO's. This is because the City acknowledges in this respect that the dispatchers do, in fact, share a community of interest with the PSO's. Given this acknowledgment, we have no reason to find otherwise. Accordingly, we find that the dispatchers share a sufficient community of interest with the PSO's to be included with them in the proposed bargaining unit.

Finally, we turn to the supervisory status of the sergeants. First, with regards to the sergeants in the law enforcement bureau, our holding that the law enforcement PSO's are "police" requires the holding that the law enforcement sergeants are too. As to the sergeants in the Fire/EMS bureau, it is our view that the record herein is simply insufficient for us to make such a determination herein. Under these circumstances, we provisionally include the three sergeants in the Fire/EMS bureau in the bargaining unit. Therefore, they will be allowed to vote by challenge ballot and their supervisory status will be reviewed at a later date.

DECISION

It is the decision of the State Board of Mediation that an appropriate bargaining unit is as follows: all PSO's and sergeants assigned to the Fire/EMS bureau of the City of Gladstone and dispatchers.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Chairman of the State Board of Mediation, or its designated representative, among the employees in the unit found appropriate, as early as possible, but not later than thirty days from the date below. The exact time and place will be set forth in the notice of election to be issued subsequently, subject to the Board's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because of vacation or illness. Ineligible to vote are those employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election. Those eligible to vote shall vote whether or not they desire to be represented for the purpose of exclusive recognition by IAFF, Local 3228.

It is hereby ordered that the City shall submit to the Chairman of the State Board of Mediation, as well as to IAFF, Local 3228, within fourteen days from the date of receipt of this decision an alphabetical list of names and addresses of employees in the unit determined above to be appropriate who were employed during the payroll period immediately preceding the date of this decision.

Signed this 5th day of January, 1990.

STATE BOARD OF MEDIATION

/s/ Mary L. Gant

Mary L. Gant, Chairman

(SEAL)

PARTIAL DISSENT

/s/ Milton O. Talent

Milton O. Talent, Employer Member

/s/ David L. Langston

David L. Langston, Employee Member

Partial Dissent

I, Milton O. Talent, employer member of the State Board of Mediation, concur in part with and dissent in part from the majority opinion in Public Case No. R 89-023. I concur in that part that finds that PSO's assigned to the law enforcement bureau are "police" within the meaning of Section 105.510. I dissent, however, from that part that finds that the PSO's assigned to the Fire/EMS bureau are not "police" with their fellow PSO's.

The Public Safety Department was originally established in 1968 to have available trained personnel in either police or fire functions. Its purpose was to provide faster and better police and fire services and to be cost effective. It had and still has one Director of Public Safety with centralized records and communications. All officers are cross trained in fire, police and EMS functions. When hired they are told they would have to function in all three areas.

All PSO's are called Public Safety Officers, are certified and commissioned to enforce the laws of the State of Missouri and ordinances of the City of Gladstone. All wear the same Class A uniforms, PSO badges and patches, carry weapons and handcuffs, and have the power to arrest. Officers assigned to the fire division have made off duty arrests.

Originally, PSO's were rotated from law enforcement to fire functions and then back to law enforcement. In 1989 when officers complained about arbitrary transfers, the Director agreed there would be no such transfer unless agreed to by the officer or if there was a need in the department, such need, for example, being the departure of an officer. Officers assigned to law enforcement assist on fires and those assigned to the fire division may be called upon to perform police functions and have done so on occasions, either on traffic detail, during vacation, or on overtime.

All PSO's have the same terms and conditions of employment except for hours of work and method of overtime pay and are entitled to use the same grievance procedures. Fire PSO's work different hours and are paid differently on overtime. All PSO's are evaluated in all categories of police, fire, EMS and personal characteristics.

In Jackson County v. Missouri State Board of Mediation, 690 SW2d 400 (Mo 1985) the Missouri Supreme Court found correction officers not to be police because they lack the power of arrest. They are not commissioned, do not wear uniforms, do not carry a weapon, and are not entitled to a police board hearing in the event of disciplinary action. It held "... the correction officers are not empowered to engage in any police work, either by investigating issues or enforcing general laws. Nor do they have the status or training of police personnel. Correction Officers do not wear uniforms, they are not sworn or commissioned, and they do not carry a firearm except when transporting a prisoner outside the jail.

In the instant case, all PSO's including those assigned to fire have the attributes described by the Court in Jackson county as necessary to be "police".

In determining who would be considered "police" within the meaning of Section 105.10, I would follow the teaching of the Courts in determining who are "supervisors" within the meaning of the National Labor Relations Act. In Ohio Power Company v. NLRB 176 F2 385 (CA6, 1949) the Court refused enforcement of a Board order finding certain individuals not to be supervisors. It held (388).

"The Board also erred as a matter of law in considering the test of the performance of supervisory duties to be the frequency of their exercise. It said...this sporadic and infrequent exercise of authority is insufficient to invest him with the 'supervisory' cloak contemplated in the Amended Act."

"(The section) does not require the exercise of the power described for all or any definite part of the employee's time. It is existence of the power which determines the classification. That power...is uncontradicted."

In West Penn Power Company v. NLRB 337 F2 993 (CA3, 1964) the Court held similarly, citing the Ohio Power Company case as well as many others (996). It confirmed that "it is the fact of possession of the power regardless of its nonexercise that is determinative" (966).

"... one clothed with real power...would be ipso facto a 'supervisor', even though in a particular instance months, or perhaps in rare cases even years, might pass before an occasion ever arose calling for an exercise of its power" (977).

The majority in the instant case like the National Labor Relations Board in the above cases would find individuals to be "police" only where they perform police functions routinely and on a continuous basis. Where the PSO's assigned to the fire/EMS bureau "perform law enforcement duties on a limited basis" it would exclude them from the definition of "police". I, on the contrary, would include them to hold that it is the existence and possession of the power regardless of its non- or limited exercise that is determinative. It is uncontradicted that all PSO's possess the "power" of "police".

For the above reasons I would find all PSO's including those assigned to the fire/EMS division to be "police" within the meaning of Section 105.510 and excluded from the certification process.

In view of my finding above it is unnecessary for me to determine the supervisory status of sergeants since they too would be "police" and excluded.